

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF KENTUCKY**

United States of America,

Plaintiff,

v.

Nally & Hamilton Enterprises, Inc.,

Defendant.

**CONSENT DECREE**

Case No. 6:14-cv-00055-DLB

**CONSENT DECREE**

WHEREAS, the United States of America (“United States”), at the request of the Plaintiff the Administrator of the United States Environmental Protection Agency has filed a Complaint in this action concurrently with the lodging of this Consent Decree, alleging that Defendant, Nally & Hamilton Enterprises, Inc. (“Nally”), violated Clean Water Act (“CWA”) Section 301(a), 33 U.S.C. § 1311(a);

WHEREAS, the Complaint alleges that Defendant violated CWA Section 301(a) by discharging dredged or fill material into waters of the United States at a surface mining site in Harlan County, Kentucky (SMCRA Permit 848-0211, referred to herein as “Fugitt Creek” or the “Fugitt Creek Permit”), (Appendix A Map of Fugitt Creek Site), outside the limits authorized by the Section 404 permit issued by the United States Army Corps of Engineers.

WHEREAS, the Complaint alleges that Defendant violated CWA Section 301(a) by discharging dredged or fill material into waters of the United States at a surface mining site in Knox County, Kentucky (SMCRA Permit 860-0380, referred to herein as “Doty Creek” or the “Doty Creek Permit”) (Appendix B Map of Doty Creek Site), without authorization by the

United States Army Corps of Engineers.

WHEREAS, on July 28, 2008, the United States Environmental Protection Agency (“EPA”) issued an Administrative Compliance Order (the “Compliance Order”) to Les Williams, Stephen Hamilton, and Nally requiring certain remedial actions to be accomplished with regard to the Fugitt Creek Permit;

WHEREAS, Defendant and the aforementioned individuals named in the Compliance Order do not admit any liability to the United States arising out of the transactions or occurrences alleged in the Complaint or Compliance Order;

WHEREAS, the Complaint and the Compliance Order seek to require the Defendant, at its own expense, to restore and/or mitigate the damages caused by its unlawful activities and to require Defendant to pay civil penalties to the United States as provided in Section 319(d) of the CWA, 33 U.S.C. § 1319(d);

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States’ claims under the CWA as set forth in the Complaint and the Compliance Order;

WHEREAS, the Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid litigation between the United States and Defendant, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, before the taking of any testimony upon the pleadings, without the adjudication or admission of any issue of fact or law except as provided in Section I of this Consent Decree, and upon consent of the Parties hereto by their authorized representatives, it is

hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION, VENUE, AND SUFFICIENCY OF COMPLAINT

1. This Court has jurisdiction over the subject matter of these actions and over the Parties pursuant to CWA sections 309(b) and 404(s), 33 U.S.C. §§ 1319(b) and 1344(s) and 28 U.S.C. §§ 1331, 1345, and 1355.

2. Venue lies in the Eastern District of Kentucky pursuant to CWA sections 309(b) and 404(s), 33 U.S.C. §§ 1319(b) and 1344(s)(3), and 28 U.S.C. §§ 1391(b) and (c).

3. For purposes of this Consent Decree, and any action to enforce this Consent Decree, Defendant consents to the Court's jurisdiction over this Consent Decree, over any such action to enforce this Consent Decree, and over Defendant, and Defendant consents to venue in this judicial district.

4. For purposes of this Consent Decree, and any action to enforce this Consent Decree, the Parties agree, and the Court finds, that the Complaint states claims upon which relief can be granted pursuant to CWA sections 301(a), 309(d), and 404(s) of the CWA, 33 U.S.C. §§ 1311(a), 1319(d), and 1344(s).

II. APPLICABILITY

5. This Consent Decree applies to and is binding upon the United States, and upon Defendant and any successors, assigns, or other entities or persons otherwise bound by law whether or not such entity or person has notice of this Consent Decree.

6. Defendant shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Consent Decree, including any contractor or consultant retained to perform Work, as defined in Section

III. Defendant shall condition any such contract upon performance of the Work in conformity with the terms of this Consent Decree.

7. In any action to enforce this Consent Decree, Defendant shall not raise as a defense the failure by any of their officers, directors, employees, agents, contractors, or consultants to take any actions necessary to comply with this Consent Decree.

### III. DEFINITIONS

8. Terms used in this Consent Decree that are defined in the CWA or in regulations promulgated pursuant to the CWA shall have the meanings assigned to them in the statute or such regulations, unless otherwise provided in this Consent Decree.

9. Whenever the terms set forth below are used in this Consent Decree, the definitions in the following subparagraphs shall apply.

- a. “CWA” shall mean the Clean Water Act, 33 U.S.C. §§ 1251-1387.
- b. “Complaint” shall mean the Complaint filed by the United States in this action.
- c. “Consent Decree” shall mean this Consent Decree; all Appendices attached hereto and listed in Section XIX of this Consent Decree; all Reports and Submissions approved by the United States Environmental Protection Agency in accordance with Section VI of this Consent Decree; and all modifications made effective in accordance with Section XIV of this Consent Decree.
- d. “Corps” shall mean the United States Army Corps of Engineers and any of its successor departments or agencies.
- e. “Day” shall mean a calendar day unless expressly stated to be a business day. In computing any period of time under this Consent Decree, where the last day would fall on a

Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

f. “Defendant” shall mean Nally & Hamilton Enterprises, Inc.

g. “Deliverable” shall mean any Work plan, monitoring and maintenance plan, monitoring report, or other document that is submitted to EPA for its review and approval pursuant to Section VI of this Consent Decree.

h. “DNR” shall mean the Commonwealth of Kentucky, Energy and Environment Cabinet, Department for Natural Resources.

i. “Doty Creek Site” shall mean real property located approximately 0.5 miles west of State Route 15 near Redfox, Knott County, Kentucky at latitude 37° 14.02’ N and longitude 82° 58.25’ W, and as shown in Appendix B (Map Doty Creek Site), and identified in Surface Coal Mining and Reclamation Operations Permit No. 860-0380.

j. “Effective Date” shall mean the date on which this Consent Decree is entered by the Court.

k. “EPA” shall mean the United States Environmental Protection Agency and any of its successor departments or agencies.

l. “Fugitt Creek Site” shall mean real property located 2.9 miles northeast of Kentucky Highway 38, near Louellen, Harlan County, Kentucky at latitude 36° 55.133’ N and longitude 83° 2.167’ W and as shown in Appendix A Map Fugitt Creek Site, and identified in Surface Coal Mining and Reclamation Operations Permit No. 848-0211.

m. “Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral;

- n. “Parties” shall mean the United States and Defendant.
- o. “Section” shall mean, except when citing a provision of the CWA or regulations, a portion of this Consent Decree identified by a Roman numeral.
- p. “Sites” shall mean the Doty Creek Site and the Fugitt Creek Site.
- q. “SMCRA” shall mean the Surface Mining Control and Reclamation Act.
- r. “United States” shall mean the United States of America, acting on behalf of the EPA.
- s. “Work” shall mean the on-the-ground activities that Defendant is required to perform, or otherwise agree to undertake, pursuant to Paragraphs 21 and 22 of this Consent Decree.

#### IV. GENERAL PROVISIONS

10. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the Complaint against the Defendant herein and the individuals identified in the Compliance Order under CWA Section 301 concerning the Sites through the date of the lodging of this Consent Decree. In addition, Defendant’s compliance with this Consent Decree resolves the United States’ civil claims for ongoing violations of the CWA alleged in the Complaint and the Compliance Order.

11. It is the express purpose of the Parties in entering this Consent Decree to further the objectives set forth in CWA Section 101, 33 U.S.C. § 1251.

12. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to any federal, state, or local laws or regulations, except as specifically provided herein. Nothing in this Consent Decree shall limit

the ability of the United States Army Corps of Engineers to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit EPA's ability to exercise its authority pursuant to CWA section 404(c), 33 U.S.C. § 1344(c).

13. This Consent Decree in no way affects or relieves Defendant of its responsibility to comply with any applicable federal, state, or local law, regulation or permit.

14. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree, except as provided in Paragraph 10.

15. The United States reserves any and all legal and equitable remedies available to enforce this Consent Decree and applicable law. The United States further reserves all legal and equitable remedies available to address any imminent and substantial endangerment to public health or welfare or the environment, whether related to the alleged violations addressed in this Consent Decree or otherwise. This Consent Decree shall not be construed to limit the rights of the United States to obtain penalties or injunctive relief under the CWA or its implementing regulations, or under other federal laws, regulations, or permit conditions, except as expressly specified in Paragraph 10 of this Consent Decree. In any subsequent proceeding initiated by the United States, Defendant shall not assert, and may not maintain, any defense or claim based on the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim splitting, or other defenses based on any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims resolved by this Consent Decree as specified in Paragraph 10 of this Consent Decree.

16. Except as provided in Section I of this Consent Decree, nothing in this Consent

Decree shall constitute an admission of fact or law by any party.

V. SPECIFIC PROVISIONS

CIVIL PENALTY

17. Payment of a Civil Penalty:

a. Defendant shall pay a civil penalty to the United States in the amount of six hundred and sixty thousand dollars (\$660,000). Defendant shall pay three hundred and thirty thousand dollars (\$330,000) of the penalty amount within thirty (30) Days of the Effective Date of this Consent Decree. Defendant shall pay the remaining three hundred and thirty thousand (\$330,000) of the penalty within one hundred and eighty (180) Days of the Effective Date of this Consent Decree.

b. To the extent that the portion of the civil penalty that is due within thirty (30) Days of the Effective Date of this Consent Decree and is not paid in full within thirty (30) Days of the Effective Date of this Consent Decree, Defendant shall be liable for interest on the unpaid portion of the civil penalty that is due, as provided for in 28 U.S.C. § 1961, accruing as of the thirty-first (31<sup>st</sup>) Day following the Effective Date of this Consent Decree. The interest shall be computed daily from the thirty-first (31<sup>st</sup>) Day following the Effective Date of this Consent Decree until the date full payment is made. The interest shall also be compounded annually.

c. To the extent that the second portion of the civil penalty that is due within one hundred and eighty (180) Days of the Effective Date of this Consent Decree is not paid in full within one hundred and eighty (180) Days of the Effective Date of this Consent Decree, Defendant shall be liable for interest on the unpaid portion of the civil penalty that is due, as provided for in 28 U.S.C. § 1961, accruing as of the one hundred and eighty-first (181<sup>st</sup>) Day



following the Effective Date of this Consent Decree. The interest shall be computed daily from the one hundred and eighty-first (181) Day following the Effective Date of this Consent Decree until the date full payment is made. The interest shall also be compounded annually.

18. Payment to the United States shall be made in accordance with the written instructions to be provided to Defendant by the United States Department of Justice. Upon payment, Defendant shall provide written notice to the United States at the addresses specified in Section XI of this Consent Decree.

19. Defendant shall not deduct any penalties paid under this Consent Decree pursuant to this Section or Section X in calculating any federal income tax owed.

#### INJUNCTIVE RELIEF

20. Work at Doty Creek Site: Defendant shall restore and monitor temporary stream impacts associated with sediment ponds 105, 106 and 92 and hollow-fill 17 in the unnamed tributary to Breeding Creek. Defendant will employ the stream restoration measures detailed in Apogee's "A Stream Restoration Plan for a Proposed Surface Mine near Sugar Branch, Knott County, Kentucky" (Appendix C) which is incorporated herein by reference. Work at the Doty Creek Site shall be completed within sixty (60) Days of Defendant's receipt of any approval required to be obtained from DNR. Annual Monitoring Reports required by Appendix C shall be submitted to EPA within thirty (30) Days of the end of the reporting year.

21. Work at Fugitt Creek Site: Defendant shall complete all mitigation measures proposed in conjunction with the Pre-Construction Notification, for the Nationwide Permit #21, DA Permit No. 2005-01310, issued to Defendant for the mining activities at Fugitt Creek (Appendix D) which is incorporated herein by reference. Defendant shall also conduct the

stream reconstruction and the removal of sediment ponds 2 and 2A as detailed in Biological Systems Consultants, Inc., “Nally and Hamilton Enterprises, Inc, DNR Permit # 848-0211 Ponds 2 and 2A Restoration Plan, BSC #2742” (Appendix E). Work at the Fugitt Creek Site shall be completed by May 1, 2014.

22. Nationwide Permit 32: The parties acknowledge that Nationwide Permit 32, *Reissuance of Nationwide Permits*, 77 Fed. Reg. 10,184 (Feb. 21, 2012), authorizes any fill that was placed in waters as of October 2008 in the areas identified in Appendixes D & E, to remain in place, subject to the conditions provided in the Nationwide Permit and this Consent Decree. The parties further acknowledge that Nationwide Permit 32 (77 Fed. Reg. 10,184), authorizes the discharge of dredged or fill material insofar as such discharge is necessary to complete the work required to be performed pursuant to this Consent Decree. Any such discharge of dredged or fill material necessary for work required by this Consent Decree shall be subject to the conditions of the Nationwide Permit and this Consent Decree.

23. Mitigation Completion Report. Within sixty (60) Days after the completion of restoration and/or mitigation activities for the Sites as described in Paragraph 20 and 21, Defendant shall certify to the EPA the completion of such activities. Defendant’s certification shall include photographs and/or videotape and “as built” drawings with topographic information showing the completed restoration/mitigation implementation activities throughout the Sites.

## VI REPORTS AND OTHER SUBMISSIONS

24. Within thirty (30) Days after the deadline for completing any task set forth in this Consent Decree, Defendant shall provide the EPA with written notice of whether or not that task has been completed at the addresses specified in Section XI of this Consent Decree.

25. If the required task has been completed late, the notice shall specify the date when it

was completed, and explain the reasons for any delay in completion beyond the scheduled time for such completion required by the Consent Decree.

26. In all notices, documents or reports submitted to the United States pursuant to this Consent Decree, the Defendant shall, by signature of a senior management official, certify such notices, documents and reports as follows:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

#### VII. RETENTION OF RECORDS AND RIGHT OF ENTRY

27. Until three (3) years after the termination of this Consent Decree pursuant to Section XV, Defendant shall retain, and shall instruct its contractors, consultants, and other agents to preserve, all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in its or its contractors' or other agents' possession or control, or that come into their contractors' or other agents' possession or control, and that relate in any manner to Defendant's performance of its obligations under this Consent Decree. This information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information-retention period, upon request by the EPA, Defendant shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

28. This Consent Decree in no way limits or affects any other rights of entry and inspection, or any rights to obtain information, held by the United States, including EPA,

pursuant to applicable federal laws, regulations, or permits, nor does it limit or affect any duty or obligation of Defendant to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

#### VIII. DISPUTE RESOLUTION

29. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section (“Dispute Resolution”) shall be the exclusive mechanism for Defendant to resolve all of its disputes arising under or with respect to this Consent Decree. Defendant’s failure to seek resolution of a dispute under this Section shall preclude Defendant from raising any such issue as a defense to an action by the EPA to enforce any obligation of Defendant arising under or with respect to this Consent Decree.

30. Any dispute Defendant has that is subject to Dispute Resolution shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Defendant sends the EPA a written Notice of Dispute, pursuant to Section XI. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed twenty one (21) Days from the date the dispute arises, unless that period is agreed to by the Parties in writing. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the EPA shall be considered binding unless, within thirty (30) Days after the conclusion of the informal negotiation period, Defendant files with the Court a motion for judicial resolution of the dispute.

31. In any dispute submitted to the Court for resolution pursuant to this Section, Defendant shall have the burden of proving by a preponderance of evidence that the EPA’s position is not in accordance with the objectives of this Consent Decree and the CWA, and that

Defendant's position will achieve compliance with the terms of this Consent Decree and the CWA.

32. The invocation of Dispute Resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Defendant under this Consent Decree. Stipulated penalties and interest, if applicable to the disputed matter, shall continue to accrue from the first Day of violation, but payment shall be stayed pending resolution of the dispute as provided in Section X. If Defendant does not prevail on the disputed issue, stipulated penalties, and interest, if applicable, shall be assessed and paid as provided in Section X.

#### IX. FORCE MAJEURE

33. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendant, of any person or entity controlled by Defendant, or of Defendant's contractors or consultants that delays or prevents the performance of any obligation under this Consent Decree despite Defendant's best efforts to fulfill the obligation. The requirement that Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any such event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay to the extent possible. "Force majeure" does not include financial inability to perform any obligation under this Consent Decree.

34. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Defendant shall provide notice to the EPA, as specified in Section XI, within 72 hours of when Defendant first knew or should have known that the event might cause a delay. Within three (3) Days after

the initial notice, Defendant shall provide in writing to the United States, in accordance with Section XI, an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Defendant's rationale for attributing such delay to a force majeure event if it intends to assert such a defense; and a statement as to whether, in the opinion of Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. The EPA may, in its unreviewable discretion, extend the time within which notice must be given. No such extension shall be effective unless it is in writing. Defendant shall include with any written notice required by this Section all available documentation supporting the claim that the delay was attributable to a force majeure event, and such notice shall be signed and certified. Failure to comply with the requirements of this Section shall preclude Defendant from asserting any defense of force majeure for that event, and for any additional delay caused by such failure. Defendant shall be deemed to know of any circumstance of which Defendant, any person or entity controlled by Defendant, including Defendant's contractors and consultants, knew or should have known.

35. If the EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event may be extended by the EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation.

36. If the EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, or does not agree to the extension of time sought by Defendant, then the EPA's position shall be binding, unless Defendant invokes Dispute Resolution under Section VIII of this Consent Decree.

37. If Defendant invokes Dispute Resolution under Section VIII of this Consent Decree, Defendant shall have the burden of demonstrating that the delay, or anticipated delay, has been, or will be, caused by a force majeure event; the number of Days of delay, or anticipated delay, that was, or will be, caused by such force majeure event; that the duration of the delay or the extension sought was, or will be, warranted under the circumstances; that Defendant could not have foreseen and prevented such delay; that Defendant, including its contractors and consultants, exercised best efforts to prevent, avoid, minimize and mitigate the delay and its effects; and that Defendant complied with the requirements of this Section.

#### X. STIPULATED PENALTIES

38. Defendant shall be liable for stipulated penalties to the EPA for violations of this Consent Decree in accordance with this Section, unless excused under Section IX (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Consent Decree, including the terms of any Deliverable or modification approved under this Consent Decree, within the specified time schedules established by or approved under this Consent Decree.

39. Stipulated penalties shall accrue for violations of this Consent Decree as follows:

- |   |                    |
|---|--------------------|
| A. For Day 1 up to and including<br>Day 30 of non-compliance  | \$1,000.00 per day |
| B. For Day 31 up to and including<br>Day 60 of non-compliance | \$2,000.00 per day |

C. For Day 61 and beyond of non-compliance \$3,000.00 per day

40. Defendant shall pay any stipulated penalty within thirty (30) Days of receiving the EPA's written demand. Defendant shall make any such payment in accordance with written instructions to be provided by the US EPA. Upon any such payment, Defendant shall provide written notice, at the addresses specified in Section XI of this Consent Decree.

41. EPA may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties that have accrued under this Consent Decree.

42. Any disputes concerning the amount of stipulated penalties or the underlying violation that gives rise to the assessment of stipulated penalties are subject to the Dispute Resolution provisions of Section VIII. Stipulated penalties and any applicable interest shall continue to accrue as provided in Paragraph 40, but need not be paid until the following:

a. If the dispute is resolved by agreement between the Parties, Defendant shall pay the amount due under such agreement, together with any applicable interest, to the EPA within thirty (30) Days of the effective date of the agreement.

b. If the dispute is taken to the Court, Defendant shall pay all accrued penalties determined by the Court to be owing, together with any applicable interest, within thirty (30) Days of receiving the Court's decision, except as provided in subparagraph c, below.

c. If any party appeals the Court's decision to the Court of Appeals (or beyond), Defendant shall pay all accrued penalties determined to be owing, together with any applicable interest, within fifteen (15) Days of receiving the final appellate decision.

43. If Defendant fails to pay stipulated penalties in accordance with this Consent



Decree, Defendant shall be liable for interest on such penalties, as provided for in 28 U.S.C. § 1961, accruing as of the date payment became due. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually. Nothing in this Paragraph shall be construed to limit the EPA from seeking any remedy otherwise provided by law for Defendant's failure to pay any stipulated penalties.

44. The stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the EPA for Defendant's violation of this Consent Decree or applicable law.

#### XI. ADDRESSES

45. All notices and communications required under this Consent Decree shall be made to the Parties through each of the following persons and addresses:

a. TO THE UNITED STATES:

i. TO THE DEPARTMENT OF JUSTICE:

Scott Spear, Trial Attorney  
Leslie Hill, Trial Attorney  
Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986  
Telephone: (202) 305-1593 (Spear); (202) 514-0375 (Hill)  
Facsimile: (202) 514-8865  
scott.spear@usdoj.gov  
leslie.hill@usdoj.gov

ii. TO EPA:

Wilda W. Cobb  
Associate Regional Counsel

U.S. Environmental Protection Agency  
Region 4  
61 Forsyth Street SW  
Mail Code 9T25  
Atlanta, GA 30303-8960  
Telephone: (404) 562-9530  
Facsimile: (404) 562-8078  
cobb.wilda@epa.gov

Mike Wylie  
Life Scientist  
U.S. Environmental Protection Agency  
Region 4  
61 Forsyth Street SW  
15th Floor  
Atlanta, GA 30303-8960  
Telephone: (404) 562-9455  
Facsimile: (404) 562-9772  
wylie.mike@epa.gov

b. TO NALLY & HAMILTON:

George L. Seay, Jr.  
Lesly A.R. Davis  
250 W. Main Street,  
Suite 1600  
Lexington, KY 40507  
Telephone: (859) 233-2012  
Facsimile: (859) 259-0649  
gseay@wyattfirm.com  
ldavis@wyattfirm.com

46. Any party may, by written notice to the other party, change its designated notice recipient or notice address provided above.

47. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

## XII. COSTS OF SUIT

48. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action. Should Defendant subsequently be determined by the Court to have violated this Consent Decree, Defendant shall be liable for any costs or attorneys' fees incurred by the EPA in any action against Defendant for noncompliance with or enforcement of this Consent Decree.

## XIII. PUBLIC COMMENT

49. The Parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts or considerations which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. Defendant agrees not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified Defendant in writing that it no longer supports entry of the Consent Decree. Defendant consents to entry of this Consent Decree in its present form without further notice.

## XIV. MODIFICATION

50. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to any term of this Consent Decree, it shall be effective only upon approval by the Court.

## XV. TERMINATION

51. After Defendant has completed the requirements of Section V of this Consent Decree and has paid any accrued stipulated penalties not waived or reduced by the United States pursuant to Paragraph 48 of this Consent Decree, Defendant may submit to the United States, at the addresses specified in Section XI of this Consent Decree, a Request for Termination, stating that Defendant has satisfied those requirements, together with supporting documentation.

52. Following receipt by the United States of Defendant's Request for Termination, the Parties may confer informally concerning the Request and any disagreement that the Parties may have as to whether Defendant has satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Consent Decree may be terminated, the United States shall submit, for the Court's approval, a joint stipulation terminating the Consent Decree.

53. If the United States does not agree that the Consent Decree may be terminated, Defendant may invoke Dispute Resolution under Section VIII of this Consent Decree. However, Defendant shall not seek Dispute Resolution of any dispute regarding termination, under Section VIII of this Consent Decree, until ninety (90) Days after service of its Request for Termination.

54. Termination of the Consent Decree does not discharge Defendant of its obligations set forth in Section VII of this Consent Decree.

## XVI. SIGNATORIES/SERVICE

55. Each undersigned representative of Nally, the United States Department of Justice, and the EPA certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the party he or she represents to this

document.

56. This Consent Decree may be signed in counterparts, such counterpart signature pages shall be given full force and effect, and its validity shall not be challenged on that basis. Defendant agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

#### XVII. INTEGRATION

57. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Consent Decree and supersedes any prior agreements and understandings, whether verbal or written, concerning the settlement embodied herein. Other than Appendices and modifications made effective in accordance with Section XIV of this Consent Decree, no other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Consent Decree or the settlement it represents, nor shall it be used in construing the terms of this Consent Decree.

#### XVIII. FINAL JUDGMENT AND RETENTION OF JURISDICTION

58. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States and Defendant.

59. This Court retains jurisdiction over this action until termination of this Consent Decree, for the purpose of resolving disputes arising under this Consent Decree, or entering orders modifying this Consent Decree, or effectuating or enforcing compliance with the terms of this Consent Decree.

XIX. APPENDICES

60. The following Appendices are attached to and part of this Consent Decree:

Appendix A: Map Fugitt Creek Site

Appendix B: Map Doty Site

Appendix C: A Stream Restoration Plan for a Proposed Surface Mine near Sugar Branch, Knott County, Kentucky

Appendix D: Pre-Construction Notification

Appendix E: Nally and Hamilton Enterprises, Inc, DNR Permit # 848-0211 Ponds 2 and 2A Restoration Plan, BSC #2742”

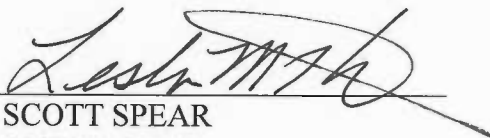
**SO ORDERED** on this \_\_\_\_ day of \_\_\_\_\_, 2014.

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DAVID L. BUNNING  
UNITED STATES DISTRICT JUDGE

**FOR THE UNITED STATES OF AMERICA:**

ROBERT G. DREHER  
Acting Assistant Attorney General  
Environment and Natural Resources Division

  
C. SCOTT SPEAR  
LESLIE M. HILL  
U.S. Department of Justice  
Environment & Natural Resources Division  
P.O. Box 7611  
Washington, D.C. 20044-7611

Dated: 3/7/14

**FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:**



Dated: 2/25/14

V. Anne Heard  
Regional Counsel and Director  
Office of Environmental Accountability  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, SW  
Atlanta, GA 30303

**OF COUNSEL:**

Wilda Watson Cobb  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street SW  
Atlanta, GA 30303-8960  
(404) 562-9530 (p)  
(404) 562-8078 (f)  
cobb.wilda@epa.gov

Dated: \_\_\_\_\_

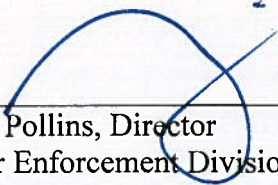
Susan Shinkman, Director  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004



*for* Camela J. Magalas

Susan Shinkman, Director  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Dated: 2/25/14

  
\_\_\_\_\_  
Mark Pollins, Director  
Water Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Dated: 2-25-14

FOR DEFENDANT :



Nally & Hamilton Enterprises, Inc.  
Stephen Hamilton, President  
4897 Highway 38  
Harlan, KY 40831

Dated: 1/24/14



George L. Seay, Jr.  
Wyatt, Tarrant & Combs, LLP  
250 West Main Street, Suite 1600  
Lexington, KY 40507

Dated: 1/24/14